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IN THE

United States Supreme Court

OCTOBER TERM

No. 75-1279

HENRY ESTEVA,
Appellant

-vs-

EDWARD F. BOARDMAN,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

JOSEPH C. JACOBS
Of The Law Firm Of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, Florida 32302

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MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the grounds that this Court does not have jurisdiction to consider the questions here and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This is a direct appeal from a unanimous final decision entered on September 30, 1975, rehearing denied on January 6, 1976, by the Supreme Court of Florida, which reversed a decision of the District Court of Appeal, First District of Florida, and which ordered reinstated a trial court final summary judgment in favor of Boardman. This decision

resolved the election contest by sustaining the election of Boardman.

Boardman was the certified winner of the election for a seat on the District Court of Appeal, Second District of Florida. Esteva, however, had a majority of the machine-cast ballots. This election contest was filed by Esteva to set aside the absentee ballots. Esteva filed suit in the Second Judicial Circuit of Florida, challenging various absentee ballots on a number of grounds, but not upon the federal grounds raised here.

Esteva's complaint did not raise the federal question posed by this appeal. In fact, his complaint merely alleges that the coding of ballots was not in conformity with required procedures under Section 101.68, Florida Statutes, and other unreferenced Florida Statutes. (Appendix A) In the Memorandum Brief in

Support of Plaintiff's (Esteva's) Motion for Summary Judgment, Esteva did not address the federal questions posed here. In fact, the questions raised by Esteva related only to the construction and requirements of Article VI, Section 1, of the Florida Constitution and Sections 101.041 and 101.68, Florida Statutes. (Appendix B)

No federal question is disclosed by the Final Summary Judgment. Quite clearly the trial court rejected the contentions that Article VI, Section 1, of the Florida Constitution and the Florida Statutes, including Section 101.68, rendered invalid the Hillsborough County absentee ballots. No federal question was even discussed by the trial court. (Appendix C)

In his assignments of error to the Final Summary Judgment, no federal

question was raised. The reference to *Papy v. Englander*, 267 So.2d 111 (Fla. 3rd D.C.A. 1972) indicates the statutory basis for the objection to the Hillsborough County absentee ballots. Again, no federal question was raised by Esteva's assignments of error. (Appendix D)

The District Court of Appeal, First District of Florida, in its opinion did not reach or deal with any such federal question, *Esteva v. Hindman*, 299 So.2d 633 (Fla. 1st D.C.A. 1974). The opinion of the Florida Supreme Court did not address or even discuss the federal questions posed here for the first time by Esteva, *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975). One would search the record in vain for reference to the federal questions posed by Esteva in this appeal.

Esteva contends violation of secrecy

of the ballot, but the coding system of absentee ballots in Hillsborough County ordered by the Circuit Court in Hillsborough County, could never result in the disclosure of a single vote, unless ordered by that Court with review available up to and including this Court. (See Court's order as an exhibit appended to Complaint filed by Esteva, p. 12-21.) No such order is in the record of this cause, nor is there any demonstration that the secrecy of the ballot was or will ever be in fact violated. There was no contention or affidavit to show any absentee voter was influenced in voting by the coding. The only purpose of the coding was an honest attempt to preserve the integrity of the absentee ballots in a very close election.

It should be noted that the trial court found a number of ballots to be

invalid and therefore sustained some objections made by Esteva. But, by and large, the objections were of a very technical and unsubstantial nature and they were rejected. (See trial court final summary judgment, original record, p. 794-803.) In so doing, the trial court sustained the "substantial compliance test". Nowhere in the record after the trial court's decision is Esteva's federal question 4 raised until this appeal. This federal question was not raised or ruled upon by the Florida Supreme Court.

The Constitution of the State of Florida vests appellate jurisdiction in the Supreme Court of Florida to review conflicting decisions of District Courts of Appeal of Florida, and decisions affecting the duties of classes of constitutional officers. Article V, Section 3(b), Florida Constitution. As the Petition for

a Writ of Certiorari to the District Court of Appeal, First District of Florida, discloses, there were nine separate bases for the exercise of conflict jurisdiction by the Florida Supreme Court. (Record in the Supreme Court, Index B, p. 1 - 15.) The concurring opinions to the decision of the Supreme Court illustrate the alternative bases for jurisdiction of the Supreme Court of Florida. *Boardman v. Esteva*, 323 So.2d 259, 270 (Fla. 1975).

Esteva has included statements, argument and the opinion of a Federal District Court suit not properly a part of this appeal. Boardman was not a party to that suit. Discussion of that case is entirely inappropriate and outside the record on this appeal. Whatever may be Esteva's appeal rights from the Federal District Court, they do not include raising points in this separate case.

The record discloses none of the federal questions raised here on appeal. The trial court treated the issue completely and responded to each objection of Esteva. The Supreme Court of Florida, in affirming the trial court's decision, resolved the conflict of the decisions around Florida and rendered uniform the rule of law in Florida.

ARGUMENT

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT.

Esteva claims jurisdiction by direct appeal under Title 28, United States Code, Section 1257(2), upon federal questions nos. 1 and 2 raised in the jurisdictional statement. Federal questions nos. 3 and 4 purport to authorize certiorari jurisdiction under United States Code, Section 1257(3).

A. No jurisdiction under Title 28, United States Code Section 1257,

is invoked by Esteva's Questions Nos. 1 and 2.

Esteva, for the first time in this matter, challenges the coding of the absentee ballots in Hillsborough County on federal grounds. For the first time in this cause, here in the jurisdictional statement, Esteva has raised an objection to the coding as being repugnant to Article IV, Section 4, of the United States Constitution and the Federal Absentee Voting Assistance Act of 1955, 50 United States Code, Section 1473.

Although the issue of secrecy of the absentee ballots has arisen in this cause as early as the complaint, the issues never involved a federal question. The challenge by Esteva apparent from the record is on the basis of Article VI, Section 1, of the Florida Constitution, and several Florida Statutes. The complaint raised only the objection that such

coding was not consistent with "Section 101.68 and other applicable Florida Statutes". (Appendix A) The Memorandum in Support of Plaintiff's Motion for Summary Judgment makes an objection based upon Article VI, Section 1, of the Florida Constitution, and Sections 101.041 and 101.68, Florida Statutes. (Appendix B) The trial court final summary judgment did not even discuss a federal question. (Appendix C) Esteva's assignments of error also do not raise a federal question. (Appendix D) Nowhere in the record is the coding challenged under Article IV, Section 4 of the United States Constitution or the Federal Absentee Voting Assistance Act of 1955, 50 United States Code, Section 1473.

It is well settled that some provision of the Federal Constitution, as distinguished from the state constitution,

must have been relied upon by the Appellant, and that that provision must have been set forth. *New York Central & N.R. Co. v. New York*, 186 U.S. 269 (1902); *Chapin v. Fye*, 179 U.S. 127 (1900); *Keokuh & Hamilton Bridge Co. v. Illinois*, 175 U.S. 626 (1900). Further, if the language is ambiguous as to the intention of court, it will be assumed that any references made to unconstitutionality is being made to the state constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928). Here there was not even an indefinite claim of repugnancy to the United States Constitution.

It is equally well established that a federal question may not be raised for the first time in the jurisdictional statement. *White River Lumber Company v. State ex rel. Appelegate*, 279 U.S. 692 (1929); *Whitney v. California*, 274 U.S. 357 (1925); and

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341 (1920). *Huffman v. Pursue, Ltd.*, 95 S.Ct. 1200 (1975), and *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), cited by Esteva as authority for jurisdiction here, each involved situations where a substantial federal question was raised earlier than in pleadings filed with this Court.

Esteva failed, through the entire proceedings in state court, to timely raise either federal question asserted here. It is only now, in his jurisdictional statement, that the federal question is framed. This comes too late to vest this Court with jurisdiction under Title 28, United States Code Section 1257. There is no basis for an appeal to or certiorari in the United States Supreme Court.

B. No jurisdiction under Title 28, United States Code Section 1257 is invoked by Esteva's

Questions Nos. 3 and 4.

Esteva asserts that this Court has jurisdiction to review the decision of the Supreme Court of Florida on the interpretation to be given to the Florida Constitution. Article V, Section 3(b)(3), provides in part:

> "May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction."

This is not a question of a judicial branch of state government invading exclusive federal jurisdiction as was the

case in *Local No. 438, et al. v. Curry*, 371 U.S. 542 (1962), and *International Union, et al. v. Russell*, 356 U.S. 634 (1957), cited by Esteva. There is no contention here that the judicial branch of Florida government could not have exercised jurisdiction, but only that its interpretation as to which of the appellate courts have this jurisdiction is in error. Most respectfully, this is solely and purely a question of interpretation and declaration of state law and not within the jurisdiction of the Supreme Court. *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651 (1927); *Quong Ham Wah Co. v. Industrial Acci. Commission*, 255 U.S. 445 (1921); and *Mt. St. Mary's Cemetery Assoc. v. Mullins*, 248 U.S. 501 (1919). This is also not the case of a complete denial of any remedy as in *Brinkerhoff-Faris Trust and Savings Co. v.*

Hill, 281 U.S. 673 (1930), cited by Esteva. Here, Esteva had three bites at the apple, he was not denied the taste. Clearly, the question of whether the Supreme Court of Florida has jurisdiction under the Florida Constitution is one solely and finally addressed to that Court. If jurisdiction were taken here, then potentially each case presented to the Florida Supreme Court by petition for writ of certiorari would be reviewable by this Court upon solely that basis. Such jurisdiction is not contemplated by Title 28, United States Code, Section 1257(3).

Esteva also asserts the Supreme Court of Florida violated prohibitions of the Fourteenth Amendment to the United States Constitution by "receding" from its earlier holding. This federal question was not raised during the proceedings in

state court. Although the issue could not have arisen until after the trial court's decision, Esteva did not raise this federal question of "retrospective and ambiguous law and a denial of rights under the Fourteenth Amendment to the United States Constitution". As argued above in Part A, it is too late to raise such issues in his jurisdictional statement. *White River Lumber Company v. State ex rel. Appelegate*, 279 U.S. 692 (1929). It is questionable whether the resolution of conflicting rules of law through the State of Florida is a denial of any federal right or subject to federal judicial jurisdiction.

II. THERE ARE NO SUBSTANTIAL QUESTIONS RAISED BY THE APPEAL.

The federal questions raised by Esteva are merely formal, void of merit and are not really in controversy. The constitutional questions presented are

therefore not substantial in character. Appellee respectfully submits that the Court should decline jurisdiction. *Zucht v. King*, 260 U.S. 174 (1922) and, *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902).

As the Supreme Court of Florida noted, there is substantial doubt as to the standing of Esteva to complain of any violation of secrecy of the absentee ballots other than his own. He stands ready to disenfranchise all of the absentee voters of Hillsborough County although there is no showing that they desire to be disenfranchised. The right of secrecy of the ballot is personal to the voter himself. The privilege to vote absentee may not even be subject to the same measure of secrecy of the ballot as an ordinary machine ballot.

Most important is the fact that no

actual violation of the secrecy of the ballot has been shown to have occurred. The coding was to be controlled by Court order and not by election officials. Again, there was nothing more than an honest attempt to preserve the integrity of the ballots cast by absentee voters so that the mistakes of some would not disenfranchise all the absentee electors of an entire urban county.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this Court does not have the jurisdiction to entertain either an appeal or certiorari in this matter. Further, the questions if considered are so lacking in merit that they are unsubstantial and the Court should decline jurisdiction. The decision appealed should be affirmed or the appeal dismissed.

Respectfully submitted,

JOSEPH C. JACOBS
of the law firm of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, FL 32302

Attorney for Appellee
EDWARD F. BOARDMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Motion to Dismiss or Affirm have been furnished via United States Mail to Leo L. Foster, Suite 608, Barnett Bank Building, Tallahassee, FL 32301, and Henry Esteva, 4510 Central Avenue, St. Petersburg, FL 33711, this 15th day of April, 1976.

_____
Attorney

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Page 9 of Memorandum Brief in Support of Plaintiff's Motion for Summary Judgment (Original Record, p. 344) Appendix B

Pages 3 and 4 of Final Summary Judgment (Original Record, p. 796, 797) Appendix C

Page 2 of Assignments of Error of Henry Esteva (Original Record, p. 807) Appendix D

APPENDIX "A"

In addition to the above and foregoing defects, inadequacies, insufficiencies, violations of the law, numerous absentee ballots were received, counted and returns made thereon that were illegal and void for failure to comply with the requirements of law.

10.

The absentee ballots received, counted and returns made thereon and included in the totals aforesaid for Boardman which were void and invalid for the reasons hereinabove set forth in Paragraphs 8 and 9 are in excess of 600 and are in excess of the number required to change the result of the election.

11.

Plaintiff further alleges that in Hillsborough County absentee ballots with one or more of the defects, insufficiencies

and violations of law set forth in Paragraphs 8 and 9 were received, counted and returns made thereon. Plaintiff further alleges in respect to absentee ballots in said county that said absentee ballots were counted and returns made thereon in accordance with a certain order of Court entered by one of the Judges of the Circuit Court of Hillsborough County, Florida, in a case entitled Arnold D. Levine and Robert H. Mackenzie, Plaintiffs, vs. Nick Falsone, Ray Campo and James Sebesta, as the duly constituted Canvassing Board of Hillsborough County, Florida, Defendants, and being Case No. 213299, lately pending in said Court, copy of the Complaint in the case aforesaid being attached hereto as EXHIBIT 1 and made a part hereof by reference, and copy of Order entered by the Court as aforesaid being attached hereto as EXHIBIT 2 and made a part hereof

by reference, and copy of Motion and Certificate of Compliance with said Order being attached hereto as EXHIBIT 3 and made a part hereof by reference. Plaintiff alleges that the County Canvassing Board of Hillsborough County did not count the absentee ballots in the manner and by the method prescribed by Section 101.68 and other applicable Florida Statutes.

APPENDIX "B"

(b) THE VIOLATION BY ELECTION OFFICIALS OF THE SECRECY OF THE BALLOT. All elections by the people shall be by direct and secret vote. Article VI, §1, Fla. Con.

The secrecy of the ballot in Hillsborough County was violated by the official Canvassing Board pursuant to Circuit Court order entered in a suit in which one of the plaintiffs was Arnold D. Levine, Attorney for the defendant, Boardman, before the said Canvassing Board. (See copies of complaint and order attached to plaintiff's complaint)

F.S. 101.041 mandates secret voting and prohibits the counting of ballots except as prescribed:

> In all elections held...the voting is by secret official ballots, printed and distributed as provided by this Code, and no ballot shall be received or counted in any election except as prescribed by this Code....

And F.S. 101.68 directs the Canvassing Board to open the outer envelopes of

the absentee ballots to be counted and, before opening the inner blank envelopes containing the voted absentee ballot, to mix them up so as to preclude identification of an individual absentee ballot with its sender.

In the very recent case (October 6, 1972) the Third District Court of Appeal of Florida invalidated a similar attempt to violate the secrecy of the absentee ballot by Circuit Court order. The following is quoted from the opinion.

> By one (order) the Canvassing Board was ordered to open all absentee ballots received prior to 5:00 P.M. on Saturday, October 7 (being four days after the election) and to keep the envelopes and ballots together "so that it may be ascertained as to which ballot came from which envelope" (contrary to the provision of the statute above referred to which required the mixing of absentee ballots so as to prevent such disclosure).
>
> ...The later October 5 order

is erroneous in that it directs action by the Board contrary to the statutory requirement for anonymity of the absentee ballots

....

Papy v. Englander, 237 So.2d 111.

(c) THE FAILURE OF ELECTION OFFICIALS TO COMPLY WITH THE FLORIDA ELECTION CODE IN THE PERFORMANCE OF THEIR DUTIES.

None of the following employees in the Supervisor of Elections office/ in Lee County who performed the duties of deputy supervisor

APPENDIX "C"

(d) There are shown 16 in which the reason for voting absentee was not specifically indicated on the application and 79 in which such reason was not indicated on the return envelope. Each of these forms contains the five categories of persons who may vote absentee with instructions to "check appropriate reason". Failure to put a check mark into one or more of those designations is not deemed fatal to the validity of the ballot. The signature of the elector is adequate to at least certify that one or more of the reasons is applicable and in the case of the certificate on the return envelope it is under oath. Even if these are to be counted illegal they would not change the results.

(e) The other irregularities, such as address of attesting witness omitted,

post office cancellation stamp not affixed, vague identification of witnesses, failure of deputies to record oath, and the other discrepancies are not of vital consequence and may be attributed more logically to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements. Fraud, corruption or gross negligence are completely absent.

(f) The plaintiff urges that all absentee votes of Hillsborough County, of which Esteva received 133 and Boardman 320, must be suppressed because they were counted and returns made in accordance with an injunction order of the Circuit Court of Hillsborough County in the case of Levine, et al v. Falsone, et al, constituting the Canvass Board, Case No. 213299. It is contended that such procedure ordered by the Court violated F.S.

101.68 and other statutes and breached the fundamental requirement of secrecy. This Court does not interpret the Hillsborough Circuit

Court order as having that effect and has not overlooked Papy v. Englanger, Fla. App. (Third) 267 So. 2d 111. However, in any event this Court has no appellate supervision of the circuit court which rendered the injunctive order, and will make no judgment except to approve the obedience of the election officials to its commands, and to accept their returns pursuant thereto.

3. Since the Rinehart cases (State ex rel Whitley v. Rinehart, 140 Fla. 645, 192 So. 819 and Rinehart v. State ex rel Whitley, 145 Fla. 612, 200 So. 218), the courts of Florida have observed the rule that absentee voting laws, being in

derogation of the common law,[1] should be strictly construed for the reason that the purity of the ballot is more difficult to preserve when voting absent than when voting in person. It was also observed in the first Rinehart case that absentee voting was not in the minds of the makers of the Constitution when that instrument was cast. In the second case, it was held that when some absentee votes were illegal and were of sufficient number to affect the outcome of the election and were commingled with the other ballots, then none would be counted and the election results would be declared on the votes cast personally by machine or otherwise in the voting places. It is to be observed that in Rinehart there were votes cast pursuant to Chapter 16986, Acts of 1935, which was declared unconstitutional, which should not be counted, and that there was

positive evidence that there were ballots cast within the state by persons who were present the day of the election and were thus not eligible to vote absentee. The facts in that case were much stronger than in the case before this Court. The cases of Frick v. State, 160 Fla. 394, 35 So.2d 10 and Griffin v. Knoth, 67 So.2d 431, recognized the Rinehart

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[1] There are precious little voting of any kind at common law.

APPENDIX "D"

COURT'S FAILURE TO FOLLOW RULE OF TOTAL REJECTION IF VOIDS EXCEED MARGIN

3. The Court committed prejudicial error in the judicial act of failing to follow the law, long established and often reaffirmed by the Florida Supreme Court, that where there are more invalid absentee ballots that should not have been counted for failure of compliance with mandatory requirements of the absentee voting statute, that all absentee ballots cast in the election must be disregarded and the election decided on the machine vote.

COURT'S ERROR IN CONTENDING THAT "LEGISLATURE NEVER INTENDED STRICT COMPLIANCE"

4. The Court committed prejudicial error in the judicial act of indicating in the last sentence of Paragraph 7 of the Final Summary Judgment that the legislature never intended rigid adherence to mandatory

requirements of the absentee voting statute.

COURT'S ERROR IN OVERLOOKING THE ORGANIC LAW WHICH VOIDS ALL BALLOTS WHICH ARE NOT SECRET BALLOTS

5. The Court committed prejudicial error and failed to comprehend its function in failing to invalidate the absentee ballots cast in Hillsborough County whereby the Circuit Court for Hillsborough County violated the organic requirement of secrecy. The Court opined... "However, in any event this Court has no appellate supervision of the circuit court which rendered the injunctive order ...".

COURT'S ERROR IN OVERLOOKING FACT THAT APPELLEE BOARDMAN WAS RESPONSIBLE FOR INSTIGATING AND PARTICIPATING IN THE VIOLATION OF THE ORGANIC LAW OF SECRECY

6. The Court committed prejudicial error in the judicial act of acknowledging but of refusing to follow in Paragraph 2(b) of the Final Summary Judgment basic law as

enunciated in the case of Papy v. Englander, 267 So. 2d 111, and refusing to invalidate all absentee ballots cast in the election in Hillsborough County where the record showed that the basic constitutional and statutory imperative of secrecy of the ballot was violated by wrongful judicial proceedings instigated and participated in by the appellee, Boardman, and/or his duly authorized attorney and representatives.